

R. T. Electric Co. of San Francisco, Inc. and Roger W. Bacon. Case 20-CA-15321

July 1, 1981

DECISION AND ORDER

On February 9, 1981, Administrative Law Judge Russell L. Stevens issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in reply to the exceptions filed by the General Counsel and in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

¹ The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In concluding the General Counsel failed to establish a violation, the Administrative Law Judge found that Roger W. Bacon did not pursue his rights under the collective-bargaining agreement after he was rejected for employment by R. T. Electric on April 30, 1980, and instead filed an unfair labor practice charge based upon the November 19, 1980, incident which earlier could have been, but was not, alleged as a violation of the Act. We find it unnecessary to pass on this finding, inasmuch as the other findings of the Administrative Law Judge are sufficient to support his dismissal of the complaint.

DECISION

STATEMENT OF THE CASE

RUSSELL L. STEVENS, Administrative Law Judge: This case was heard in San Francisco, California, on November 25, 1980.¹ The complaint, issued June 26, is based upon a charge filed on April 30 by Roger W. Bacon,² an individual. The complaint alleges that R. T. Electric Co. of San Francisco, Inc. (hereinafter Respondent), violated Section 8(a)(3) and (1) of the National Labor Relations Act (hereinafter the Act).

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally. Briefs, which have

been carefully considered, were filed on behalf of the General Counsel and Respondent.

Upon the entire record, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

At all times material herein Respondent, a California corporation with an office and place of business in San Francisco, has been engaged as an electrical contractor in the building and construction industry, constructing commercial and office facilities. During the calendar year ending December 31, 1979, Respondent, in the course and conduct of its business operations purchased and received at its San Francisco, California, facility products, goods, and materials valued in excess of \$50,000 directly from points located outside the State of California.

I find that Respondent is, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers, Local Union No. 6 (herein the Union), is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background³

Respondent is a member of The San Francisco Electrical Contractors Association, Inc. (herein the Association), which has a collective-bargaining agreement⁴ with the Union. That agreement includes an article on "Referral Procedure—Union Security"⁵ which provides, *inter alia*, that "[t]he Employer shall have the right to reject any applicant for employment."

Roger Bacon, the Charging Party herein, is, and for approximately 20 years has been, a journeyman electrician and a member of the Union. In 1972, Bacon worked approximately 2 months for Red Top Electric, whose superintendent then was Michael Johnston, who later was employed by Respondent.

Johnston has been superintendent of Respondent at times relevant herein, in charge of electrical construction on a high rise building at 180 Montgomery Street, San Francisco. The general foreman on the job was responsible to Johnston.

On January 15, 1979, Bacon was hired by Respondent to work at the 180 Montgomery Street site. Bacon was laid off January 23, 1979, and did not question, or complain about, the layoff.

Bacon was working for C. B. Farrow, a subcontractor of Respondent, at the 180 Montgomery Street site in No-

³ This background summary is based upon credited testimony and evidence that is not in dispute.

⁴ Jt. Exh. 1.

⁵ *Id.*, art. III, p. 11.

¹ All dates hereinafter are in 1980 unless stated to be otherwise.

² Individuals are referred to herein by their last names.

vember 1979. On November 19, Bacon observed Johnston carrying some tools, and later that day Bacon reported to a union representative what he had seen. Still later that day, Bacon was discharged by C. B. Farrow, and he reported that fact to the Union on the day of the discharge. By letter dated January 18,⁶ Franz Glen, the Union's business manager-financial secretary, notified the Association, Respondent, and C. B. Farrow of Bacon's complaint and discharge, and stated that the Union "is seeking the rehiring of Roger Bacon by C. B. Farrow" with backpay. Subsequently, by letter dated May 28,⁷ Glen notified the Association and Bacon that the "lay-off" of Bacon had been investigated, and that Bacon's complaint was found to be without substantiation. Glen's investigation included conversations with Johnston and others. The Union heard no further from Bacon about the incident.

On April 30, 1980, Bacon received a dispatch slip from the Union for a job with Respondent at the 180 Montgomery Street site. Bacon was late in reporting to Respondent, and arrived at approximately 9 or 9:30 a.m. Johnston was present when Bacon arrived, and refused to accept Bacon as an employee. Johnston signed the referral slip with a refusal, and Bacon left. No reason was given by Johnston for the refusal. Bacon grieved the matter to the Union but a union representative told him that Respondent had the right of refusal under the bargaining agreement.

B. The 1972 Employment of Bacon

Johnston testified that the general foreman of the job laid off Bacon because of the latter's "lack of production," after Bacon had been on the job "a couple of months." Bacon testified that he was laid off and that when he left the job a crew of electricians still remained on the job. Bacon said he did not know, and never asked, why he was laid off.

In view of Bacon's testimony, which provides some support for that of Johnston, and based upon observation of the witnesses, Johnston's testimony on this matter is credited. Bacon, who is a journeyman electrician, acknowledged that he was laid off during construction. An inference is indicated, and found, that the layoff was for cause other than unavailability of work.

C. Bacon's January 1979 Employment

Johnston testified that during Bacon's 9 days of employment,⁸ he observed Bacon "wandering around looking out the windows." He was not permitted to deal directly with employees, hence he said nothing to Bacon. He did not say anything to the general foreman, either, but he is not supposed to talk with the foremen. He did not see Bacon when the latter reported to the job on dispatch from the Union. Bacon was put to work by the general foreman. Edward Richard, the general foreman, later asked Johnston for Bacon's paycheck, which Johnston procured. The foreman had not been instructed to refuse to hire Bacon. Bacon's employment record shows

that he was laid off, rather than discharged, and that the skill and acceptability for rehire portions of the record are not completed. Johnston later testified that the record forms referred to are those for the Association, which merely are to show employment status, they are given no weight for any purpose, and rehire acceptability is not related to, or dependent upon, the forms. Respondent customarily shows employees as laid off, even though they may have been discharged.

Edward Richard testified that Bacon "had a habit of wandering away from his assigned job site," and that he observed such action on two occasions. He decided to discharge Bacon because of the latter's wandering from his work area. He asked Johnston to have Bacon's paycheck made out and, when he gave it to Bacon, the latter did not ask why he was laid off. However, Bacon did ask, and Richard told him, when they met each other on the street 2 or 3 weeks later. He said nothing about poor performance to Bacon during the latter's employment because he was not permitted to deal directly with employees. He made his own decisions on whether to retain, or layoff, employees.

Bacon testified, on rebuttal, that his job often required that he wait, doing nothing, while a fellow employee left to pick up work material or to shut off a switch. He said he was closely supervised while on the job, and that he sometimes completed work other employees had started.

Discussion

It is clear from the testimony of Johnston and Richard, who are credited, that they were not satisfied with Bacon's performance on the job, and that Bacon was laid off, or discharged, solely for that reason. No other reason was advanced by any witness, including Bacon, and Respondent was not charged by the General Counsel with having violated the Act by laying off, or discharging, Bacon. The contract between Respondent and the Union has a grievance procedure, but that procedure was not invoked by Bacon. Johnston credibly testified that he was not satisfied with Bacon in 1972. Bacon nonetheless was hired again in January 1979, but that fact is given no weight since approximately 7 years separated the two hires and, further, Johnston was not present when Bacon was dispatched to Respondent. There is no evidence to show that Respondent was satisfied with Bacon as an employee, or that Bacon was a good employee. To the contrary, Bacon was released after 9 calendar days from a job that was continuing. The inference is clear that his services were not satisfactory to Respondent.

D. Bacon's November 1979 Employment

Bacon testified that on November 19, 1979, at approximately 9:30 a.m., he saw Johnston, whom he remembered from previous jobs, carrying tools and approaching the job shack. Bacon told Johnston "that's our work and I'd turn him into the Union." Johnston was 5 feet away at the time, and Bacon is "very sure" Johnston heard what he said. Later in the day Bacon's foreman told him that Johnston had related Bacon's remarks to him. Bacon was discharged later in the day, and the fol-

⁶ Jt. Exh. 2.

⁷ Jt. Exh. 4.

⁸ Bacon's total worktime was 7 days.

lowing day he received a letter wherein "discharged" had been changed to "layoff." One other employee, not identified, was laid off at the same time as Bacon. Prior to the layoff, Bacon had not been warned about, or suspended because of, poor work or poor attitude.

Gerald O'Brien, General Counsel's witness, testified that he was the job foreman for C. B. Farrow at the 180 Montgomery Street site and worked with Bacon in November 1979. He was present during the incident involved herein, and heard Bacon say to Johnston "Mike, you know you're not supposed to carry tools." Johnston made a reply, but O'Brien did not remember what it was. It was something to the effect of "it's none of your business." Johnston then asked O'Brien "are you going to hire this guy" or something to that effect. Johnston said something profane about Bacon, but O'Brien does not remember what it was. Bacon was "terminated" that day. O'Brien had been on vacation, and the day he returned was the day of the incident. Bacon was "terminated" because of a request from the previous job foreman, on the ground that Bacon was late coming back from lunch and late getting to work a couple of times, "and things of that nature."

Discussion

So far as Johnston's carrying tools is concerned, the Union investigated that charge and found it to be without support. Further, the Union found the discharge to be not in violation of the bargaining agreement. The layoff or discharge was not alleged to be in violation of the Act.

The testimonies of Bacon and O'Brien relative to events of November 19 prior to the discharge are in substantial variance. Neither is considered reliable because of such discrepancies. Johnston denied that Bacon told him that he was doing union work and would be reported, and he denied ever having had a conversation with Bacon. A credibility resolution on this point is not necessary. Whether or not Bacon made such comments would not control any issue, since there is no dispute concerning the fact that the Union later notified Johnston that such a complaint had been made. Johnston testified that such a complaint was Bacon's prerogative, and that the complaint did not anger him. Johnston denied that he ever referred to Bacon in a derogatory manner. It is noteworthy that the incident used as the basis for the charge herein was not used as a basis for an 8(a)(3) charge when the incident occurred.

E. The Incident of April 30

Bacon testified that he went to the hiring hall at 8 or 8:15 a.m., and asked about jobs. Several jobs were available, including the one at the 180 Montgomery Street site. He selected the latter, since it was the one nearest to Bart, the commuter train. One job was closer to Bart than Respondent's worksite, but it was being picketed.⁹

⁹ Glen corroborated this fact. However, this testimony is given no weight, since the Union listed the job. It seems most unlikely that the Union would refer its member-employees to a job being picketed by sanction of a union.

He left the hiring hall at approximately 8:30 a.m., and arrived at the worksite late, approximately at 9 a.m.

Glen testified that six jobs were available on April 30, including those at Respondent's site and the site allegedly being picketed. The Union may ask an employer for explanation of a rejection, if the rejected employee requests that a reason be given. The Union would have asked Respondent for a reason had Bacon requested one, but he did not make such a request. During the past 5 years there have been two rejections—that of Bacon, and one other. Bacon did not grieve the rejection of April 30.

Discussion

The principal question is whether Johnston rejected Bacon because of the November 1979 incident relative to the tools, or because Bacon was an unsatisfactory employee.

The fact that Johnston, and Respondent, did not like Bacon's performance as an employee is clear from the record, and is found.

Johnston denied that his rejection of Bacon had anything to do with the November 1979 incident, and the circumstances of that incident are hazy, as discussed *supra*. The discrepancies between the versions of Bacon and O'Brien cannot be ignored. Johnston testified that the only reason he rejected Bacon was the latter's record as a poor employee.

Bacon's explanation of why he chose Respondent's job rather than any of the others seemed self-serving and unrealistic, particularly in view of the fact that Bacon already had been laid off, or discharged, by Johnston or Respondent on three earlier occasions. Further, Bacon did not pursue his contractual rights after the rejection. Rather, he filed an unfair labor practice charge based upon an incident that earlier possibly could have been, but was not, alleged as a violation of the Act.

General Counsel argues that there is a discrepancy between Respondent's answer and Respondent's trial defense. However, Respondent's answer was the result of telephone and office conversations. Pleadings are not proof.

General Counsel did not meet the burden of proof required by the Act, and no violation of the Act is found.¹⁰

Upon the basis of the foregoing findings of fact and the entire record, I make the following:

CONCLUSIONS OF LAW

1. R. T. Electric Co. of San Francisco, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local Union No. 6, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not, as alleged, violate Section 8(a)(3) and (1) of the Act.

¹⁰ *Federal Mogul Corporation v. N.L.R.B.*, 566 F.2d 1245 (5th Cir. 1978), and cases cited therein; *Pellegrini Bros. Wines, Inc.*, 239 NLRB 1220 (1979); *Kaye-Smith Enterprises*, 211 NLRB 1034 (1974).

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹¹

The complaint is dismissed in its entirety.

¹¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.